

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

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CLYDE TERRY and ANNE TERRY,  
Plaintiffs,

NO. CIV. S 04-2314 MCE GGH

v.

MEMORANDUM AND ORDER

THE TRAVELERS INSURANCE CO.,  
KENNEL PAK, GENTZLER & SMITH  
ASSOCIATES, INC., et al.,

Defendants.

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Defendants Kennel Pak and Gentzler & Smith Associates, Inc.,  
(collectively "Defendants" or "Brokers") have asked this Court to  
dismiss the breach of contract, negligence, fraud, and negligent  
misrepresentation claims asserted by Plaintiffs Clyde and Anne  
Terry (collectively "Plaintiffs") pursuant to Federal Rule of  
Civil Procedure 12(b)(6).<sup>1</sup> Alternatively, Defendants seek relief  
under Rules 12(e). Defendants have also asked the Court to

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<sup>1</sup> Unless otherwise stated, all further references to a  
"Rule" or "Rules" are to the Federal Rules of Civil Procedure.

1 strike portions of Plaintiffs' complaint pursuant to Rule 12(f).  
2 For the reasons discussed below, Defendants' motion to dismiss is  
3 GRANTED in part and DENIED in part. Defendants' motion to strike  
4 is GRANTED in part and DENIED in part, as discussed below.

5  
6 **BACKGROUND<sup>2</sup>**  
7

8 Plaintiffs are commercial real estate lessors in Dixon,  
9 California. On April 30, 2001, Plaintiffs entered into a written  
10 lease agreement ("the Lease") with Alan and Karen Levens ("the  
11 Levens"), who run a dog boarding and training business known as  
12 Alan's Canine Training & Kennel. The Lease required the Levens  
13 to obtain an insurance policy that 1) provided coverage for  
14 liabilities arising out of the Levens' use of the leased premises  
15 and 2) named Plaintiffs as additional insureds. (Compl. at 4.)

16 On March 8, 2001, before signing the lease, the Levens  
17 applied to Defendants<sup>3</sup> for the requisite insurance. In response  
18 to a question on the insurance application, the Levens indicated  
19 that they planned to conduct "Obed. Schutzhund" training.  
20 Schutzhund training consists of tracking, obedience, and  
21 protection training for various kinds of dogs. Plaintiffs had no  
22 knowledge of details of the transaction between the Levens and  
23

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24  
25 <sup>2</sup> Some of the factual allegations as set forth in this  
26 section are disputed by the parties. To the extent either party  
has interposed objections, those objections are overruled unless  
otherwise noted.

27 <sup>3</sup> As alleged by Plaintiffs, Defendants are independent  
28 corporations doing business together as an agent of Travelers  
Insurance Company ("Travelers").

1 Defendants, other than the fact that it had occurred. (Compl. at  
2 4-5.)

3 On April 24, 2001, as a result of Defendants' efforts,  
4 Travelers issued an insurance policy to the Levens, which 1)  
5 covered the Levens for liabilities arising out of their use of  
6 the leased premises, and 2) named Plaintiffs as additional  
7 insureds. Shortly thereafter, on April 30, 2001, Plaintiffs and  
8 the Levens signed the Lease. On May 1, 2001, Defendants issued a  
9 certificate of liability insurance to Plaintiffs on behalf of  
10 Travelers. (Compl. at 5.)

11 After the lease had been signed, Plaintiffs learned that the  
12 Levens were using the leased premises for Shutzhund training.  
13 While Plaintiffs knew of the Levens' kenneling and grooming  
14 activities, which involved some minor obedience training, they  
15 did not realize the Levens were conducting Schutzhund training as  
16 well. On October 30, 2002, Plaintiffs contacted Defendants to  
17 determine whether the insurance policy covered them for liability  
18 related to Schutzhund training. (Compl. at 6.)

19 Defendants responded by sending Plaintiffs a letter  
20 indicating that the policy had an endorsement<sup>4</sup> that, in fact,  
21 excluded such training. Defendants informed Plaintiffs that  
22 Travelers intended to send a notice of cancellation on November  
23 1, 2002, based on "increased liability exposure" and the fact  
24 that the Levens' training activities did not meet the

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25  
26 <sup>4</sup> It was later determined that this endorsement only  
27 pertained to "completed operations coverage", i.e., coverage for  
28 liability that arises after the dogs are trained and leave the  
facility (meaning that Plaintiffs might have been covered for  
training occurring on their property, as required by the lease).

1 "underwriting guidelines." Cancellation was effective January 3,  
2 2003. (Compl. at 6-7.)

3 On November 27, 2002, Plaintiffs filed suit in state court  
4 against the Levens for, *inter alia*: 1) breach of the Lease, and  
5 2) misrepresenting the nature of their activities on the leased  
6 premises. In February 2003, Travelers agreed to provide legal  
7 defense services for the Levens. As part of its defense,  
8 Travelers reinstated the insurance policy on July 9, 2003. The  
9 effective date of the policy was established to be January 3,  
10 2003 (the date of the earlier cancellation by Travelers). The  
11 Terry-Levens suit went to trial on July 21, 2003. Based  
12 primarily on the fact that the Levens had an enforceable policy  
13 that met the requirements of the Lease, the court directed a  
14 verdict in favor of the Levens. (Compl. at 7-9.)

15 In response, Plaintiffs brought suit against Defendants in  
16 federal court, alleging, *inter alia*, that Defendants did not  
17 fully disclose all of the information in their possession to  
18 Travelers. As a result of Defendants' failure to disclose,  
19 Travelers issued a policy that did not conform to the  
20 requirements of the Lease. Plaintiffs contend that once they  
21 learned the Levens did not have the proper insurance coverage,  
22 they were forced to file suit against the Levens in state court.  
23 (Compl. at 14:18-24.) As discussed above, Plaintiffs lost that  
24 suit, incurring over \$200,000 in attorney's fees, which are still  
25 accruing on appeal. Plaintiffs claim they have been forced to  
26 file the present action as a result of Defendants conduct.  
27 (Compl. at 15, 16, 18, 20.)

1 In the present action, Plaintiffs argue that if Defendants  
2 had made a full disclosure of the information in their possession  
3 (which included knowledge of the Levens' intent to conduct  
4 Shutzhund training), Travelers would never have issued a policy  
5 to the Levens. Plaintiffs speculate that since the Levens would  
6 not have been able to obtain insurance elsewhere, they would have  
7 been without the requisite coverage. Consequently, because the  
8 Levens would have been without insurance, Plaintiffs would never  
9 have signed the lease, which, in turn, means that they would  
10 never have needed to file a law suit to evict the Levens.  
11 (Compl. at 14:12-24.) Defendants contend that the facts in this  
12 case, as discussed above, do not allow Plaintiffs to state a  
13 claim for breach of contract, negligence, fraud, or negligent  
14 misrepresentation.

#### 15 16 STANDARD 17

18 On a motion to dismiss for failure to state a claim under  
19 Rule 12(b)(6), all allegations of material fact must be accepted  
20 as true and construed in the light most favorable to the  
21 nonmoving party. Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336,  
22 337-38 (9th Cir. 1996). A complaint will not be dismissed for  
23 failure to state a claim unless it appears beyond doubt that a  
24 plaintiff can prove no set of facts in support of his [or her]  
25 claim that would entitle him [or her] to relief. Yamaguchi v.  
26 Dep't of the Air Force, 109 F.3d 1475, 1480 (9th Cir. 1997)  
27 (quoting Lewis v. Tel. Employees Credit Union, 87 F.3d 1537, 1545  
28 (9th Cir. 1996)).

1 In addressing the federal pleading requirements, the Supreme  
2 Court has found that the statement required under Rule 8(a) must  
3 "simply give the defendant fair notice of what the plaintiff's  
4 claim is and the grounds upon which it rests. This simplified  
5 notice pleading standard relies on liberal discovery rules and  
6 summary judgement motions to define disputed facts and issues and  
7 to dispose of unmeritorious claims . . . Rule 8(a)'s simplified  
8 pleading standard applies to all civil actions, with limited  
9 exceptions." Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512  
10 (2002) (citations and quotations omitted).

11 In contrast to the general pleading requirements, pursuant  
12 to Rule 9(b), "all averments of fraud or mistake, the  
13 circumstances constituting fraud or mistake shall be stated with  
14 particularity . . . " F.R.C.P. 9(b). A complaint can be  
15 dismissed if it does not comply with Rule 9(b). See Vess v.  
16 Ciba-Geigy Corp. USA, 317 F.3d 1097, 1102 (9th Cir. 2003).

17 Under Rule 15(a), when there is no "[u]ndue delay, bad  
18 faith[,] dilatory motive on the part of the movant . . . undue  
19 prejudice to the opposing party by virtue of . . . the amendment,  
20 [or] futility of the amendment," leave to amend a complaint is to  
21 be "freely given when justice so requires." Foman v. Davis, 371  
22 U.S. 178, 182 (1962); F.R.C.P. 15(a). Generally, leave to amend  
23 is denied only if it is clear that the deficiencies of the  
24 complaint could not be cured by amendment. Broughton v. Cutter  
25 Labs., 622 F.2d 458, 460 (9th Cir. 1980).

26 Finally, pursuant to Rule 12(f), "the court may order  
27 stricken from any pleading any insufficient defense or any  
28

1 redundant, immaterial, impertinent, or scandalous matter." Fed.  
2 R. Civ. P. 12(f).

3  
4 **ANALYSIS**

5  
6 The Court will first address, in Section 1, Defendants'  
7 motion under Rule 12(f) to strike portions of Plaintiffs'  
8 complaint. Then, in Section 2, the Court will address  
9 Defendants' motion under Rule 12(b)(6) to dismiss particular  
10 claims asserted by Plaintiff.

11  
12 **1. Motion to Strike**

13  
14 Defendants argue that Plaintiffs cannot recover attorneys'  
15 fees, emotional distress damages, or punitive damages. (Mot. to  
16 Dis. at 18:10, 19:5, 19:23.) Defendants have asked the Court to  
17 strike such recovery as immaterial and impertinent. (Mot. to  
18 Dis. at 18:7-9.)

19 With respect to punitive damages, the Court finds that they  
20 may be recoverable in this action, should Plaintiffs prevail on  
21 their fraud claim. Cal. Civ. Code § 3294(a) ("where it is proven  
22 by clear and convincing evidence that the defendant has been  
23 guilty of . . . fraud . . . the plaintiff, in addition to the  
24 actual damages, may recover damages for the sake of example and  
25 by way of punishing the defendant."). Thus, Defendants' motion  
26 to strike all references to punitive damages in the complaint is  
27 denied.

1 As for emotional distress damages, Plaintiffs seek such  
2 recovery as a direct result of Defendants' alleged fraud and  
3 negligent misrepresentation. (Compl. at 19:2-4, 20:21-23.)  
4 Under California law, intentional torts, such as fraud, will  
5 support recovery for emotional distress, but only "in cases  
6 involving extreme and outrageous intentional invasions of one's  
7 mental and emotional tranquility . . . [e.g.,] where a reasonable  
8 [person], normally constituted, would be unable to adequately  
9 cope with the mental stress engendered by the circumstances of  
10 the case." Molien v. Kaiser Found. Hosp., 27 Cal. 3d 916, 927-28  
11 (1980); Intrieri v. Superior Court, 117 Cal. App. 4th 72, 74  
12 (2004) (finding fraud to be an intentional tort); Cal. Civ. Code  
13 §§ 1709, 3333. Thus, assuming Plaintiffs' allegations to be  
14 true, Defendants' motion to strike all references to damages for  
15 emotional distress in relation to Plaintiff's fraud claim is  
16 denied.

17 However, under California law, unintentional torts, such as  
18 negligent misrepresentation, will not support recovery for  
19 emotional distress arising from property damage, absent special  
20 circumstances, which are not present in this case as pled.  
21 Erlich v. Menezes, 21 Cal. 4th 543, 554, 555-56 (1999) ("No  
22 California court has allowed recovery for emotional distress  
23 arising solely out of property damage.") (citations and  
24 quotations omitted); Friedman v. Merck & Co., 107 Cal. App. 4th  
25 454, 484-85 (2003); Yu v. Signet Bank/Virginia, 69 Cal App. 4th  
26 1337, 1397 (1999) ("in general, a plaintiff incurring neither  
27 physical impact nor physical damage and whose loss (other than  
28 emotional distress) is solely economic, is entitled neither to



1 punitive damages nor to a recovery for emotional distress.")  
2 (quotations and citations omitted); Finch v. Brenda Raceway  
3 Corp., 22 Cal App. 4th 547, 554 (1994) (holding that emotional  
4 distress damages are not recoverable when a negligent  
5 misrepresentation causes only economic injury).

6 Here, Plaintiffs seek recovery for emotional distress  
7 engendered by a potential injury to personal property. (Opp'n at  
8 28:27-28, 29:2-5, 29:11-13.) Such recovery is not allowed under  
9 California law. Consequently, Defendants' motion to strike all  
10 references to damages for emotional distress in relation to  
11 Plaintiffs' negligent misrepresentation claim is granted.  
12 Plaintiffs are granted twenty (20) days leave to amend in  
13 accordance with the Court's ruling.

14 Finally, with regard to attorneys' fees as consequential  
15 damages, under the American Rule, parties are expected to  
16 shoulder their own legal fees. Cassim v. Allstate Ins. Co., 33  
17 Cal. 4th 780, 811 (2004); Cal. Civ. Code § 1021. The California  
18 Supreme Court has established some very limited exceptions to  
19 this rule, which are applicable only under special circumstances.  
20 Cassim, 33 Cal. 4th at 807, 811; Brandt v. Superior Court, 37  
21 Cal. 3d 813, 817, 820, 820 n.8 (1985) ("If you find (1) that the  
22 plaintiff is entitled to recover . . . for breach of the implied  
23 covenant of good faith and fair dealing, and (2) that because of  
24 such breach it was reasonably necessary for the plaintiff to  
25 employ the services of an attorney to collect the benefits due  
26 under the policy, then and only then is the plaintiff entitled to  
27 an award for attorney's fees.") (quotations and citations  
28 omitted); Prentice v. N. Am. Title Guar. Corp., 59 Cal. 2d 618,

620 (1963) ("A person who through the tort of another has been required to act in the protection of his interests by bringing or defending an action against a third person is entitled to recover compensation for . . . attorney's fees."); but cf. Davis v. Air Tech. Indus., Inc., 22 Cal. 3d 1, 7 (1978) ("the Prentice exception was not meant to apply in every case in which one party's wrongdoing causes another to be involved in litigation with a third party. If applied so broadly, the judicial exception would eventually swallow the legislative rule that each party must pay for its own attorney. To avoid this result, Prentice limits its authorization of fee shifting to cases involving exceptional circumstances.") (quotations and citations omitted).

Here, the Court finds that Plaintiffs have failed to plead a valid exception to the American Rule. First, the attorneys' fees sought in this case (as well as those sought in the Terry-Levens lease action) do not qualify as Brandt fees. Brandt, 37 Cal. 3d at 820 n.8. Second, Plaintiffs have failed to plead exceptional circumstances analogous to those in Prentice, a false arrest case, or a malicious prosecution case, where 1) the litigant's hand is forced, and 2) he or she *required* to take legal action in order to 3) vindicate a particular right. Finally, the Prentice exception to the American Rule is only applicable in situations where the proven *tort* of another required or necessitated litigation. Reserve Ins. Co. v. Pisciotta, 30 Cal. 3d 800, 801, 817 (1982). Thus, attorneys' fees, if recoverable at all, will only be recoverable in the context of tort damages, not contract damages. Applied Equip. Corp. v. Litton Saudi Arabia Ltd., 7

1 Cal. 4th 503, 515 (1994) ("[in contract] consequential damages  
2 beyond the expectation of the parties are not recoverable.")

3 In consideration of the forgoing, Defendants' motion to  
4 strike all references to attorneys' fees as consequential damages  
5 is granted. Plaintiffs are granted twenty (20) days leave to  
6 amend, with respect to their tort causes of action, in accordance  
7 with the Court's ruling.

8  
9 **2. Motion to Dismiss**

10  
11 **A. The Breach of Contract Claim**

12  
13 To state a cause of action for breach of contract Plaintiff  
14 must allege the following: 1) the existence of a contract, 2)  
15 Plaintiffs' performance, 3) Defendants' breach, and 4)  
16 Plaintiffs' resulting damages. Reichert v. General Ins. Co., 68  
17 Cal. 2d 822, 830 (1968); Careau & Co. v. Sec. Pacific Business  
18 Credit, Inc., 22 Cal. App. 3d 1371, 1388 (1990). In this case,  
19 the second element, Plaintiffs' performance, is not at issue as  
20 Plaintiffs have asserted their claim as third party  
21 beneficiaries. (Opp'n 11:8-16.)

22 Under the federal notice pleading standard, the threshold  
23 for successfully pleading a breach of contract claim is extremely  
24 low. Fed R. Civ. P. 8(a); Swierkiewicz, 534 U.S. 506, 510-11,  
25 512 (2002); cf. McGary v. City of Portland, 386 F.3d 1259, 1262  
26 (9th Cir. 2004). Accepting all allegations of fact as true and  
27 construing them in the light most favorable to Plaintiffs, the  
28 Court finds that Plaintiffs have indeed satisfied the pleading

1 requirements. Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337-  
2 38 (9th Cir. 1996).

3 First, Plaintiffs have alleged the existence of a contract  
4 under which they have rights as third party beneficiaries.

5 On April 30, 2001, Plaintiffs and the Levens signed a written  
6 lease agreement. As a condition of the lease, the Levens were  
7 required to obtain insurance coverage sufficient to insure  
8 Plaintiffs against any liability that might arise from their  
9 activities on the leased property. As a result of these  
10 conditions, Plaintiffs claim that the Levens entered into a  
11 second contract (with Defendants) to obtain the insurance  
12 coverage required by the Terry-Levens lease agreement (Compl. at  
13 14:5-11). Plaintiffs claim that this independent contract  
14 between the Levens and Defendants (to obtain the requisite  
15 insurance coverage) obligated Defendants, as brokers, to 1)  
16 obtain coverage that insured Plaintiffs against liability arising  
17 out of the Levens' use of Plaintiffs' land, 2) obtain information  
18 regarding the requested policy and forward that information to  
19 Travelers, and 3) not conceal or fail to disclose pertinent  
20 information to Travelers. Mercury Casualty Co. v. Maloney, 113  
21 Cal. App. 4th 799, 802 (2003) ("A person who is not a party to a  
22 contract may nonetheless have certain rights thereunder, and may  
23 sue to enforce those rights, where the contract is made expressly  
24 for her benefit."); Johnson v. Holmes Tuttle Lincoln-Merc., 160  
25 Cal. App. 2d 290, 296-97 (1958); Cal. Civ. Code § 1559.

26 Second, Plaintiffs have specifically alleged a breach of  
27 contract by asserting that Defendants failed to fulfill all of  
28 their obligations under the aforementioned contract. (Compl. at

1 14:12-17, 15:3-7.) Defendants' argument that the contract was  
2 not breached because the requisite coverage was obtained is a  
3 question for summary judgment. See Swierkiewicz, 534 U.S. at  
4 512.

5 Finally, the Court finds that Plaintiffs have pled specific  
6 damages as a result of Defendants' alleged contractual breach.  
7 (Compl. at 14:18-24, 15:8-27.) Furthermore, the Court notes that  
8 the issues of foreseeability and causation, if properly plead,  
9 are questions for summary judgment, not a motion to dismiss.  
10 Bergerco, U.S.A. v. Shipping Corp. Of India, Ltd., 896 F.2d 1210,  
11 1212 (9th Cir. 1990); Milligan v. Golden Gate Bridge Highway and  
12 Transportation Dist., 120 Cal. App. 4th 1, 9 (2004).

13 In light of the liberal notice pleading requirements of Rule  
14 8(a), the Court finds that Plaintiffs have given Defendants fair  
15 notice of their breach of contract claim and the grounds upon  
16 which it rests. Consequently, Defendants' motion to dismiss  
17 Plaintiffs' breach of contract claim is denied.

#### 18 19 **B. The Negligence Claim**

20  
21 To state a cause of action for negligence, Plaintiff must  
22 allege the following: 1) that Defendants owe a duty of care to  
23 Plaintiffs, 2) Defendants breached that duty, 3) legal causation,  
24 and 4) damages. Trujillo v. N. County Transit Dist., 63 Cal.  
25 App. 4th 280, 286-87 (1998); Jones v. Grewe, 189 Cal. App. 3d  
26 950, 954 (1987).

27 The threshold for successfully pleading a negligence claim  
28 is extremely low. Fed R. Civ. P. 8(a); Swierkiewicz, 534 U.S.

1 506, 510-11, 512 (2002); cf. McGary v. City of Portland, 386 F.3d  
2 1259, 1262 (9th Cir. 2004). Accepting all allegations of fact as  
3 true and construing them in the light most favorable to  
4 Plaintiffs, the Court finds that Plaintiffs have indeed satisfied  
5 the federal pleading requirements for a negligence claim. Cahill  
6 v. Liberty Mut. Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996).

7 First, the Court finds that Plaintiffs have pled the  
8 existence of a valid duty. (Compl. at 16:7-8.) The California  
9 Supreme Court has set forth factors for determining when a party  
10 to a transaction owes a duty of care to a third party. Biakanja  
11 v. Irving, 49 Cal. 2d 647, 650 (1958) ("The determination whether  
12 in a specific case the defendant will be held liable to a third  
13 person not in privity is a matter of policy and involves the  
14 balancing of various factors, among which [is] the extent to  
15 which the transaction was intended to affect the plaintiff").

16 Here, the Court finds that the contract between Defendants  
17 and the Levens was made at the request of Plaintiffs and was  
18 specifically intended to protect Plaintiffs personal interests.<sup>5</sup>  
19 Thus, the Court finds that, in this particular case, Defendants  
20 owed Plaintiffs a duty of care in obtaining a coverage policy  
21 that insured Plaintiffs against liability arising out of the  
22 Levens' use of the leased property.

23 Second, Plaintiffs have alleged a breach of Defendants'  
24 aforementioned duty of care. Specifically, Plaintiffs claim that  
25 Defendants failed to provide Travelers with the necessary  
26

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27  
28 <sup>5</sup> The Court finds that this fact outweighs the other  
Biakanja factors.

1 information pertaining to the Levens' dog training activities.  
2 (Compl. at 16:5-8.)

3 Finally, Plaintiffs have pled specific damages as a  
4 proximate result of Defendants' alleged breach of duty. (Compl.  
5 at 16:9-28.) As discussed in Section A above, the Court notes  
6 that whether the requisite coverage was obtained, like the issues  
7 of foreseeability and causation (if properly plead), are  
8 questions for summary judgment, not a motion to dismiss.  
9 Swierkiewicz, 534 U.S. at 512; Bergerco, U.S.A. v. Shipping Corp.  
10 Of India, Ltd., 896 F.2d 1210, 1212 (9th Cir. 1990); Milligan v.  
11 Golden Gate Bridge Highway and Transportation Dist., 120 Cal.  
12 App. 4th 1, 9 (2004).

13 In light of the liberal notice pleading requirements of Rule  
14 8(a), the Court finds that Plaintiffs have properly pled a cause  
15 of action for negligence, thereby giving Defendants fair notice  
16 of Plaintiffs' claim and the grounds upon which it rests.  
17 Consequently, Defendants' motion to dismiss Plaintiffs'  
18 negligence claim is denied.

### 19 20 **C. The Fraud Claim**

21  
22 To state a cause of action for fraud, Plaintiff must allege  
23 the following: 1) a misrepresentation of material fact, 2)  
24 knowledge of falsity, 3) intent to deceive and induce reliance,  
25 4) justifiable reliance on the misrepresentation, and 5)  
26 resulting damages. Century Sur. Co. v. Crosby Ins., 124 Cal.  
27 App. 4th 116, 122 (2004). Under the Federal Rules, fraud must be  
28 plead with particularity. Vess v. Ciba-Geigy Corp. USA, 317 F.3d

1 1097, 1106 (9th Cir. 2003) ("the circumstances constituting the  
2 alleged fraud [must] be specific enough to give defendants notice  
3 of the particular misconduct . . . so that they can defend  
4 against the charge . . . [a]llegations of fraud must be accompanied  
5 by the who, what, when, where, and how of the misconduct  
6 charged.") (quotations and citations omitted).

7       Accepting all allegations of fact as true and construing  
8 them in the light most favorable to Plaintiffs, the Court finds  
9 that Plaintiffs have satisfied the federal pleading requirements  
10 for fraud. Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337-38  
11 (9th Cir. 1996). In this case, Plaintiffs have alleged two  
12 fraudulent actions on the part of Defendants. First, an  
13 intentional failure to disclose material information to Travelers  
14 (Compl. at 17:6-13), and second, intentionally issuing a false  
15 and misleading insurance certificate to Plaintiffs (Compl. at  
16 17:14-17). Cal. Civ. Code § 1710.

17       The Court finds that the first fraudulent action, as  
18 alleged, is insufficient for Plaintiffs to state a claim against  
19 Defendants. In addition to problems with alleging the requisite  
20 scienter, Plaintiffs never relied on Defendants' concealment  
21 (from Travelers) of material information - they relied on the  
22 results of that alleged fraud, i.e., the policy. City of  
23 Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 68  
24 Cal. App. 4th 445, 482, 482 n.34 (1998) ("It is essential . . .  
25 that the person complaining of fraud actually have relied on the  
26 alleged fraud, and suffered damages as a result."). In essence,  
27 Plaintiffs have stated a cause of action for Travelers, not  
28



1 themselves, with regard to the first action. See, e.g., Century,  
2 124 Cal. App. 4th 116 (2004).

3 However, the allegations as to the second action satisfy the  
4 federal pleading requirements for fraud. Having alleged  
5 misrepresentation (via the document), scienter, and intent  
6 (Compl. at 17:14-17), as well as reliance (Compl. at 17:20-21)  
7 and damages (Compl. at 19:2-9.), Plaintiffs' allegations are  
8 sufficiently definite and substantive to state a cause of action  
9 against Defendants for fraud. Vess, 317 F.3d at 1106.  
10 Consequently, Defendants' motion to dismiss Plaintiff fraud claim  
11 is denied.

#### 12 13 **D. The Negligent Misrepresentation Claim**

14  
15 To state a cause of action for negligent misrepresentation,  
16 Plaintiff must allege the following: 1) a false statement of a  
17 material fact that Defendant honestly believed to be true, but  
18 made without reasonable grounds for such belief, 2) the statement  
19 was made with the intent to induce reliance, 3) reasonable  
20 reliance, and 4) damages. Century, 124 Cal. App. 4th at 129;  
21 Cicone v. URS Corp., 183 Cal App. 3d 194, 208, 211 (1986).

22 Though the threshold for successfully pleading a negligent  
23 misrepresentation claim is very low, Plaintiffs allegations are  
24 insufficient to state such a claim. Fed R. Civ. P. 8(a);  
25 Swierkiewicz, 534 U.S. 506, 510-11, 512 (2002); cf. McGary v.  
26 City of Portland, 386 F.3d 1259, 1262 (9th Cir. 2004). Cahill v.  
27 Liberty Mut. Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996).

1 Plaintiffs negligent misrepresentation claim is based on two  
2 alleged actions by Defendants, which are essentially the same  
3 actions alleged in the fraud claim. First, a negligent  
4 concealment involving Travelers (Compl. at 19:14-21), and second,  
5 a negligent misrepresentation (the certificate of insurance) to  
6 Plaintiffs (Compl. at 19:21-26). As discussed in Section C  
7 above, the alleged concealment will not support a claim by  
8 Plaintiffs against Defendants for lack of the appropriate  
9 scienter and reliance. City of Atascadero, 68 Cal. App. 4th at  
10 482, 482 n.34 ("the person complaining of fraud [must] have  
11 relied on the alleged fraud").

12 As for Plaintiffs alleged negligent misrepresentation, the  
13 Court finds that Plaintiffs have failed to fully satisfy the  
14 requirements for stating such a claim. (Opp'n at 24:19-20.)  
15 Specifically, Plaintiffs have failed to allege that Defendants'  
16 misrepresentation was "made without reasonable grounds" for  
17 believing the statement to be true. Cicone, 183 Cal App. 3d at  
18 208. The Court finds this element of the claim to be  
19 particularly important. If Defendants were in fact negligent (as  
20 opposed to intentional) in their transactions with Travelers,  
21 then, conceivably, they would have a very reasonable basis for  
22 believing the certificate of insurance was valid, e.g.,  
23 reasonable mistake or oversight. Plaintiffs must allege  
24 otherwise in order to state a claim for negligent  
25 misrepresentation.

26 The Court finds that Plaintiffs have failed to allege the  
27 required elements of a negligent misrepresentation claim.  
28 Consequently, Defendants' motion to dismiss Plaintiffs' negligent


misrepresentation claim is granted. Plaintiffs are granted twenty (20) days leave to amend in accordance with this Court's ruling.

**CONCLUSION**

For the aforementioned reasons, Defendants' motion to dismiss is GRANTED in part and DENIED in part. Defendants' motion to strike is also GRANTED in part and DENIED in part. Plaintiffs are granted twenty (20) days leave to amend in accordance with this order.

IT IS SO ORDERED.

DATED: April 27, 2005

  
MORRISON C. ENGLAND, JR.  
UNITED STATES DISTRICT JUDGE